Small Group: Foreign Sovereign Immunity

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Background Note

The UN Convention on Jurisdictional Immunities of States and Their Property

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On December 2, 2004, the UN General Assembly adopted the UN Convention on Jurisdictional Immunities of States and Their Property. See UNGA Res. 59/38 (Dec. 2, 2004) (adopted without a vote). The treaty was opened for signature on January 17, 2005, when Austria and Morocco became the first states to sign. As of August 2006, 18 states had signed; Norway became the first State Party in March 2006. The Convention will remain open for signature until January 17, 2007. It will enter into force when thirty states have deposited their instruments of ratification, acceptance, approval, or accession with the UN secretary-general.

This new treaty is the first modern multilateral instrument to articulate a comprehensive approach to issues of state or sovereign immunity from suits in foreign courts. It embraces the so-called "restrictive theory" of sovereign immunity, under which governments are subject to essentially the same jurisdictional rules as private entities in respect of their commercial transactions.

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The Convention builds on experience under the 1972 European Convention on State Immunity, May 16, 1972, ETS No. 74, at <http://conventions.coe.int>, reprinted in 11 ILM 470 (1972), as well as on state practice under various domestic statutory regimes. See, e.g., State Immunity Act, 1978, c. 33 (UK), reprinted in 17 ILM 1123 (1978); Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (1976), reprinted in 15 ILM 1388 (1976) (codified as amended at 28 U.S.C. §§1330, 1391(f), 1441(d), 1602–1611) [hereinafter FSIA]. For additional statutory materials, see Andrew Dickinson, Rae Lindsay, & James P. Loonam, State Immunity: Selected Materials and Commentary (2004), and Materials on Jurisdictional Immunities of States and Their Property, UN Doc. ST/LEG/Ser.B/20 (1982). Generally, see Hazel Fox, The Law of State Immunity (2002).

The text ultimately adopted by the UN General Assembly originated in the deliberations of the International Law Commission (ILC), which at the request of the UNGA first took up the subject in 1977. In 1991, the ILC adopted twenty-two draft articles on second reading. See [1991] 2 Y.B Int'l L. Comm'n 8, UN Doc. A/46/10, reprinted in 30 ILM 1554 (1991). The Sixth Committee of the General Assembly then established an open-ended working group to consider the draft articles, which met for two sessions. See UN Docs. A/C.6/47/L.10 (1992) and A/C.6/48/L.4 (1993). At the General Assembly's invitation, the ILC again took up the subject in 1999, see Report of the International Law Commission on the Work of Its Fifty-First Session, UN GAOR, 54th Sess., Supp. No. 10, paras. 471–84, UN Doc. A/54/10 (1999); id., annex. The ILC's materials on jurisdictional immunities of states and their property are available at <http://www.un.org/law/ilc/guide/gfra.htm>.

The final text was elaborated by an Ad Hoc Committee on Jurisdictional Immunities of States and Their Property (established by UNGA Res. 55/150, Dec. 12, 2000), which met for three sessions. Its final report was adopted on

March 5, 2004 (see UN Doc. A/59/22), and is available at http://www.un.org/law/jurisdictionalimmunities/index.html>.

Substantively, the Convention provides that, subject to certain specified exceptions, a state enjoys immunity from the jurisdiction of foreign courts in respect of itself and its property. The term “state” is broadly defined to include the various organs of government as well as the constituent units of a federal state and the political subdivisions of the state if “entitled to perform acts in the exercise of sovereign authority, and . . . acting in that capacity.” Also included are the agencies and instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State.

The definition of “state” also explicitly embraces “representatives of the State acting in that capacity.” By including individuals who represent the state, the Convention clearly endorses the broader principle of “foreign official immunity.” The Convention does not, however, affect the privileges and immunities enjoyed by a state under international law in relation to the functions of its diplomatic missions, consular posts, special missions, missions to international organizations, or delegations to “organs of international organizations or to international conferences,” as well as of persons connected with them. Nor do its provisions apply to the privileges and immunities accorded under international law to heads of state ratione personae or with respect to aircraft or space objects owned or operated by a state.

The express exceptions to the immunity of a state and its property set forth in Articles 7 to 18 of the Convention include, inter alia, claims arising from: commercial transactions; contracts of employment; personal injury and damage to property; ownership, possession, and use of property; intellectual and industrial property; state-owned or -operated ships used for other than

government noncommercial purposes; certain matters relating to arbitration proceedings; and situations involving consent to jurisdiction.

As a practical matter, the most important exception to immunity concerns commercial transactions. Article 10(1) provides that a State cannot invoke immunity in a proceeding arising out of a commercial transaction with a foreign natural or juridical person when, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State. Article 10(2) provides, however, that this exception does not apply in the case of commercial transactions between states or if the parties to the commercial transaction have expressly agreed otherwise.

Under Article 2(1)(c), the term "commercial transaction" means (i) any commercial contract or transaction for the sale of goods or supply of services, (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction, (iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

In determining whether a particular contract or transaction is a "commercial transaction" for these purposes, Article 2(2) provides that reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.

The Convention also sets forth exceptions to protection from pre- and post-judgment measures of constraint. The basic rule in either case is restrictive: no measures of constraint may be taken against state property unless, and to the extent that, the state in question has allocated or earmarked property for the satisfaction of the claim that is the object of the proceeding, or the state has

expressly consented to such measures by international agreement, by an arbitration agreement or in a written contract, or by a declaration before the court or in a written communication after a dispute has arisen. Separate articles provide criteria for service of process on foreign states and for rendering default judgments against properly served sovereign defendants. It was generally understood during the negotiations that the Convention does not cover criminal proceedings. The General Assembly explicitly agreed with that interpretation in its resolution adopting the Convention. Nor does the Convention apply to military activities.

An annex to the Convention, which forms an integral part of the Convention, sets forth certain understandings with respect to specific articles. Reference must be made to these understandings in interpreting the particular articles to which they apply. In addition, appropriate recourse should also be made to the pertinent ILC reports, the reports of the Ad Hoc Committee, and UNGA Res. 59/38, which together form the relevant travaux préparatoires. Finally, reference should also be made to the statement of the chair of the Ad Hoc Committee, which the General Assembly expressly took into account in its resolution adopting the convention and which is to be included in the Summary Records of the Sixth Committee.

The substance of the Convention reflects an emergent global consensus, increasingly demonstrated in doctrine as well as practice, that states and state enterprises can no longer claim absolute immunity from the proper jurisdiction of foreign courts and agencies, especially for their commercial activities. For the most part, the exceptions it articulates to the general rule of foreign state immunity have already been widely recognized and provide courts with reliable means of balancing the legitimate interests of states when acting in their sovereign capacity, on the one hand, with the need to provide appropriate means of recourse for those who deal with, or are affected by, states when they act in a

private capacity. Adoption of the Convention provides a basis for substantial harmonization of national laws in a vital area of transnational practice, reflecting the shared interests of states in this increasingly important area of law.

A more detailed description of the Convention may be found at Stewart, Current Developments: The UN Convention on Jurisdictional Immunities of States and Their Property, 99 AJIL 194 (2005).